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6 FOODS PRIVATE LABEL, L.P., WHOLE FOODS
MARKET SERVICES, INC., WHOLE
7 FOODS MARKET CALIFORNIA, INC. and
WHOLE FOODS MARKET DISTRIBUTION, INC.
8

9 UNITED STATES DISTRICT COURT

10 NORTHERN DISTRICT OF CALIFORNIA

11 SHOSHA KELLMAN, on behalf of herself
and all others similarly situated,

12 Plaintiffs,

13 v.

14 WHOLE FOODS PRIVATE LABEL, L.P.,
15 WHOLE FOODS MARKET CALIFORNIA,
INC., WHOLE FOODS MARKET
16 SERVICES, INC., and WHOLE FOODS
MARKET DISTRIBUTION, INC.

17 Defendants.
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Case No. 17-cv-06584-LB

**DEFENDANTS' STATEMENT IN
SUPPORT OF PLAINTIFF'S
ADMINISTRATIVE MOTION TO
SEAL PORTIONS OF PARTIES'
JOINT DISCOVERY LETTER [EFC
NO. 142]**

Magistrate Judge Laurel Beeler

Case No. 17-CV-06584-LB

STMT. ISO PLTF'S ADMIN MTN. TO SEAL
PORTIONS OF JOINT DISC. LTR. [ECF NO. 142]

1 **A. BACKGROUND**

2 On August 7, 2020, Plaintiff Shosha Kellman (“Plaintiff”) filed an Administrative Motion
 3 to seal portions of the parties’ Joint Discovery Letter being submitted in accordance with the
 4 Court’s Standing Order regarding expedited procedures for discovery disputes. *See* ECF No. 142-
 5 3. In the joint letter, both parties discuss the content of several internal agreements that defendants
 6 Whole Foods Private Label, L.P. (“WF LP”), Whole Foods Market Services, Inc. (“WFM
 7 Services”), and Whole Foods Market California, Inc. (“WFM California”) (collectively
 8 “Defendants”) designated Highly Confidential under the terms of the Stipulated Protective Order
 9 entered in this action. *See* ECF Nos. 142 to 142-3. The Court previously sealed similar discussion
 10 of this internal information and processes by Orders entered December 21, 2018 and March 29,
 11 2019. *See* ECF Nos. 89 and 106.

12 Defendants designated the content of certain internal financial agreements “Highly
 13 Confidential” because they contain sensitive business and financial information that is not
 14 generally available to the public and would be of value to Defendants’ competitors if released to
 15 the public. The documents discuss and reflect Defendants’ consolidated cash management
 16 systems, intercompany loans, and the obligations by and between various Whole Foods Market
 17 entities.

18 In accordance with Civil L.R. 79-5(e), Plaintiff lodged an unredacted copy of the Joint
 19 Discovery Letter and filed this Administrative Motion for an order sealing the redacted portions of
 20 the letter. *See* ECF Nos. 142. Defendants now submits this statement in support of sealing
 21 portions of the parties’ Joint Discovery Letter.

22 **B. ARGUMENT**

23 In this district, a party seeking to file a document under seal must comply with a two-prong
 24 requirement. The party must “(1) comply with Civil Local Rule 79-5; and (2) rebut the [] strong
 25 presumption in favor of access that applies to all documents other than grand jury transcripts or
 26 pre-indictment warrant materials.” *Kamakana v. City & Cnty. Of Honolulu*, 447 F.3d 1172, 1178
 27 (9th Cir. 2006) (citations and internal quotations omitted).

1 With respect to the first prong, Local Rule 79-5 requires, a request that (1) “establishes that
 2 the document, or portions thereof, are privileged, protectable as a trade secret or otherwise entitled
 3 to protection under the law”; and (2) is “narrowly tailored to seek sealing only of sealable
 4 material.” Civil L.R. 79-5(b).

5 “With respect to the second prong, the showing required for overcoming the strong
 6 presumption of access depends on the type of motion to which the document is attached.” *Gaudin*
 7 *v. Saxon Mortg. Servs.*, 2013 WL 2631074, at *1 (N.D. Cal. Jun. 11, 2013). “‘Good cause’ is the
 8 proper standard when parties wish to keep records attached to a non-dispositive motion under
 9 seal.” *Real Action Paintball, Inc. v. Advanced Tactical Ordnance Systems, LLC*, 2015 WL
 10 1534049, at *2 (N.D. Cal. Apr. 2, 2015) (citing *Pintos v. Pac. Creditors Ass’n*, 605 F.3d 678 (9th
 11 Cir. 2010)). That is, a party need only make a “particularized showing under the good cause
 12 standard of Rule 26(c)” to justify the sealing of the materials. *Kamakana*, 447 F.3d at 1180.
 13 Under this standard, a court may, for good cause, keep documents confidential “to protect a party
 14 or person from annoyance, embarrassment, oppression, or undue burden or expense.” Fed. R. Civ.
 15 P. 26(c).

16 A discovery motion is a type of non-dispositive motion (similar to a motion to dismiss for
 17 lack of personal jurisdiction) because it does not resolve the merits of the underlying causes of
 18 action, and is only tangentially related to the merits. *See e.g., Real Action Paintball*, 2015 WL
 19 1534049, at *3 (citations omitted). Thus, the “good cause” standard should apply to the parties’
 20 Joint Discovery Letter and Plaintiff’s request to seal.

21 The redacted portions of the Joint Discovery Letter contain information that should be
 22 sealed because they satisfy both the first and second prong under Ninth Circuit law: (1)
 23 Defendants have narrowly tailored the request to seal information that is “privileged or protectable
 24 as a trade secret or otherwise entitled to protection under the law” and (2) there is “good cause” for
 25 Defendants to not want this sensitive business information released to competitors or otherwise
 26 made widely available.

1 **1. Defendants' Information Is Sealable**

2 “A trade secret is generally defined as information that (1) derives independent economic
3 value from not being generally known to the public, and (2) is the subject of efforts to maintain its
4 secrecy.” *La. Pac. Corp. v. James Hardie Bldg. Prods.*, 2013 WL 3483618, at *2 (N.D. Cal. Jul.
5 8, 2013) (citing 18 U.S.C. § 1839(3); Cal. Civ. Code § 3426.1(d)). Documents detailing a party’s
6 “business and pricing strategies” are treated as “trade secret[s]” or “confidential information.”
7 *Stanislaus Food Prods. Co. v. USS_POSCO Indus.*, 2012 WL 6160468, at *4 (E.D. Cal. Dec. 11,
8 2012). Documents dealing with a party’s internal business strategy and financial performance are
9 treated as protected trade secrets for the purposes of a sealing motion. *See In re NCAA Student-*
10 *Athlete Name & Likeness Licensing Litig.*, 2013 WL 1997252, at *2 (N.D. Cal. May 13, 2013)
11 (sealing document “marked confidential” that “reveal[ed] the internal strategy and decision
12 making process” and where “disclosure could harm [the requesting party’s] competitive
13 standing”); *see also Muench Photography, Inc. v. Pearson Educ., Inc.*, 2013 WL 4475900, at *4
14 (N.D. Cal. Aug. 15, 2013) (“If disclosed, Pearson alleges, the information at issue could reveal
15 Pearson’s product development efforts and business strategies to competitors...”). Moreover,
16 “[f]inancial and customer data can constitute a protectable trade secret.” *Scottsdale Ins. Co. v.*
17 *Cook*, 2010 WL 4942764, at *3 (D. Az. Nov. 24, 2010; *see also Gaudin, supra*, 2013 WL
18 2631074, at *2 (“In its declaration, Defendants maintains that certain of the materials contain
19 customer data and sensitive internal commercial information. The Court concludes that there is
20 good cause to seal this material, since exposing it to the public would subject Defendant to undue
21 burden or expense.”))

22 **2. Good Cause Exists for Sealing the Documents**

23 As more fully detailed in the Supplemental Declaration of Jay Warren (ECF No. 86-1),
24 good cause exists to seal certain redactions identified in the Joint Discovery Letter. The letter
25 discussed competitively sensitive intercompany information and agreements, and commercially
26 sensitive financial and revenue management information that, if unsealed, would provide
27 Defendants’ competitors with access to its trade secrets and highly sensitive commercial

information, and would have the effect of working a significant economic harm on Defendants.

See ECF No. 86-1 ¶¶2-3. The portions of the letter that should be sealed are:

DISCOVERY LETTER REDACTIONS PAGE No.	COMMENT	SUPPORTING EVIDENCE
Page 1	Discusses competitively sensitive intercompany information and agreements, and commercially sensitive financial and revenue management information	ECF No. 86-1, ¶¶2-3
Page 4, fn. 2	Discusses competitively sensitive intercompany information and agreements, and commercially sensitive financial and revenue management information	ECF No. 86-1, ¶¶2-3

C. CONCLUSION

For the reasons set forth above, the Supplemental Declaration of Jay Warren (ECF No. 86-1) and the Court's prior Order sealing this same information (ECF Nos. 89 and 106), Defendants respectfully requests that the Court grant Plaintiff's application to seal the parties' unredacted Joint Discovery Letter [ECF No. 142].

Dated: August 12, 2020

BLAXTER | BLACKMAN LLP

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